Supreme Court, U.S.
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No. 93-216
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

PAUL P. SLAWEK,

PETITIONER

v.

GATEWAY BROADCASTING CORP., ET AL,

RESPONDENTS

BRIEF OF THE RESPONDENTS ERIC BROWNDORF, THE TOWNSHIP OF LOWER, DANIEL HILL, JOAN TAYLOR, THE ATLANTIC CITY PRESS, JAMES HOPSON AND PAUL MERKOSKI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, Eric Browndorf, the Township of Lower, Daniel Hill, Joan Taylor, The Atlantic City Press, James Hopson, and Paul Merkoski respectfully submit that the Petition filed on behalf of Paul B. Slawek for a Writ of Certiorari should be denied and that this Court should not grant review of the determinations made in the United States Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE

This is a case in which the petitioner, Paul Slawek, who had been a debtor in a Chapter XI bankruptcy proceeding, alleges the existence of an elaborate and far-reaching conspiracy among the press, the government, attorneys, and the United States Bankruptcy Court, to destroy petitioner's restaurant business, defame him, prevent him from successfully practicing law in the State of New Jersey after graduation from law school, and to inflict emotional distress and physical illness upon him.

Plaintiff's claim appears to have its origins in a transaction taking place in September of 1982, when he and his wife purchased a restaurant known as "The Anchorage" from Mr. and Mrs. Thomas Wallace, Mr. and Mrs. George Wallace, and Wallace's Anchorage Associates. Slawek gave the Wallaces a purchase money mortgage on the premises. He claims that after taking over the business, he "rejuvenized" and reorganized it. He alleges that the Wallaces, who were now "resentful" of the business's prosperity, began to conspire with a number of

other persons to force Slawek out and to regain control of the business. Slawek alleges that in early 1988 he entered into an agreement to sell the business for $1,450,000, or almost three times his purchase price. He claims that the sale fell through, but that the business liquor license was erroneously transferred to the prospective buyer, and that this caused the business to experience severe financial difficulties. Slawek claims that as a result of these financial difficulties, he caused a Chapter 11 petition in bankruptcy to be filed in the United States Bankruptcy Court in Camden, New Jersey, on October 6, 1988. He states that the case was then assigned to United States Bankruptcy Court Judge Judith Wizmur. The Wallaces, to protect their rights as against Slawek and his business, retained attorney Eric Browndorf to represent their interests.

Slawek contends that Mr. Browndorf was a "regular" at the Bankruptcy Court in Camden, and on "good terms" with Judge Wizmur. According to plaintiff, the Wallaces and their wives, together with Browndorf, and with the active aid and abeyance of Judge Wizmur, carried out a conspiracy utilizing "fraud, misrepresentations, the submission of false legal bills, liable, slander, invasion of privacy, the submission of false affidavits and false certifications to the Court, interference with plaintiff's business relationships and breach of contract, the purpose of which was to destroy plaintiff's reputation and destroy plaintiff's business, acquire plaintiff's interest in a family partnership, remove plaintiff from his management position within the partnership and acquire valuable real estate and to derive other personal profits at the expense of the plaintiffs."

Slawek claims that the Wallaces and Browndorf somehow convinced the news media, including the Atlantic City Press and radio station WBNJ, to print and broadcast false reports about the plaintiff alleging that he was illegally operating boat slips on property owned by the government. In fact, Slawek conceded in his complaint that a "large number" of boat docks were built "without the necessity of permits" upon a parcel of property which he admittedly does not own, and the title to which is actually in either the State of New Jersey or the government of the United States.

The involvement of the Township of Lower, a municipality located in Cape May County, New Jersey, and its zoning officer, Daniel Hill, and tax collector, Joan Taylor, is less than clear. The allegations in this alleged "conspiracy" against the Township are based solely on the theory of respondeat superior. As to the two individual Township employees, plaintiff alleged in conclusory, non-specific fashion that defendants Hill and Taylor assisted the Wallace defendants by allegedly releasing false information about the plaintiff to the bankruptcy court and the media defendants. This allegedly "false" information concerned plaintiff's failure to secure dock permits and his failure to pay taxes, all of which plaintiff admitted to in his complaint.

The plaintiff's complaint was filed in the United States District Court for the Eastern District of Pennsylvania on September 10, 1990. The District Court's jurisdiction was originally based upon federal question jurisdiction under 28. U.S.C. 1331 and diversity of citizenship under 28 U.S.C. § 1332, the plaintiff being a citizen of Pennsylvania and defendants allegedly being citizens of New Jersey.

However, as is set forth herein, plaintiff thereafter destroyed diversity jurisdiction when he filed his amended complaint leaving only federal question jurisdiction as the basis for the District Court's jurisdiction.

On January 18, 1991, an order was entered dismissing all counts of the complaint alleging jurisdiction by reason of diversity against the defendant Atlantic City Press, the trade name for a Pennsylvania Corporation, South Jersey Publishing Company, dismissing all counts of the complaint against the defendant "JOY 105" Radio WBNJ, and transferring venue to the United States District Court for the District of New Jersey, with the consent of the plaintiff.

On December 9, 1991, the United States District Court for the District of New Jersey entered an order granting the motion of the defendant Lower Township Municipal Utility Authority to dismiss the complaint of the plaintiff as against it pursuant to Fed. R. Civ. P. 12(b)(6). By order dated January 16, 1992, that Court denied the motion of the plaintiff to amend his complaint so as to add additional claims arising under 42 U.S.C. § 1983. The said order permitted plaintiff to amend his complaint to name the corporate entity for the Atlantic City Press, South Jersey Publishing Company, a Pennsylvania Corporation. Plaintiff incorporated by reference in his amended complaint all allegations (all 151 paragraphs) and prayers for relief of his original complaint including his state law claims.

Subsequently, the defendants Joan Taylor, Daniel Hill, the Township of Lower, Michael Sinko, Colleen Wallace, Thomas Wallace, and Wallace's Anchorage Associates moved to dismiss the complaint of the plaintiff pursuant to Fed. R. Civ. P. 12(b)(6). At the same time,

the defendants Eric Browndorf, Paul Merkoski, James Hobson, and the Atlantic City Press moved for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c) or in the alternative for summary judgment pursuant to Fed. R. Civ. P. 56. By Order dated May 13, 1992, the United States District Court granted all of the defendants' motions to dismiss and for judgment on the pleadings. The same order also denied the plaintiff's motion to change venue back to the United States District Court for the Eastern District of Pennsylvania.

In its May 13, 1992 decision, the District Court examined the federal RICO claim as stated in the complaint of the plaintiff and as elaborated in more detail in plaintiff's RICO case statement. The Court found that the plaintiff had failed to satisfy the "pattern" requirement of RICO, and that the cause of action was therefore deficient as a matter of law. The Court went on to conclude that as this federal question was the only basis for the Court's jurisdiction, the remaining state claims would also be dismissed. Because of this conclusion by the District Court, it did not consider the separate arguments raised by the defendants in their motion for judgment on the pleadings, motion to dismiss or summary judgment. In support of those motions, the defendants enumerated the substantive deficiencies in all of the remaining state law causes of action pleaded by the plaintiff.

Slawek filed an Appeal with the United States Court of Appeals for the Third Circuit. In an opinion filed February 26, 1993, the Court of Appeals unanimously affirmed the Order of the United States District Court, dismissing Slawek's Complaint. The Court of Appeals observed in that opinion that "the scandalous and conclusory allegations set forth in appellant's brief before

us bear no resemblance to the allegations of his Amended Complaint." (F2.)[1] The Court of Appeals went on to observe that the petitioner's amended Complaint alleged non-RICO claims against South Jersey Publishing Company, a Pennsylvania corporation. As petitioner is also a citizen of Pennsylvania, the District Court had no diversity jurisdiction to hear his claim. Having dismissed the appellant's only federal claim (under RICO), the District Court therefore "properly declined to exercise supplemental jurisdiction." (F3.) A sur-petition for rehearing by Slawek was denied by the United States Court of Appeals for the Third Circuit, en banc, by Order dated April 7, 1993. (G2.)

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[1]All references are to the appendices annexed to the petition for certiorari.

REASONS FOR DENYING THE WRIT

THE QUESTIONS PRESENTED BY THE PETITIONER DO NOT FAIRLY REFLECT THE FACTS IN THIS CASE AND DO NOT ARISE OUT OF THE RECORD BELOW.

The Court of Appeals for the Third Circuit observed that the "scandalous and conclusory allegations set forth in appellant's brief" did not bear any "resemblance to the allegations of his Amended Complaint." (F2.) The same must be said of the petition for certiorari. An examination of the pleadings and of the opinions of the courts below demonstrates how loose and groundless are the claims which make up petitioner's proposed issues on certiorari. This is in direct contrast to the requirement that a petitioner supply "clear, definite and complete disclosures concerning the controversy when applying for certiorari [citations omitted]." Southern Power Company v. North Carolina Public Service Company, 263 U.S. 508, 509 (1924). Under Supreme Court Rule 15.1, the respondent is obligated to point out misstatements of fact and law in the petition so that a writ is not mistakenly granted, only to learn upon full consideration of the record that the issues presented cannot be decided. Erie Railroad Company v. Kirkendall, 266 U.S. 185, 185-186 (1924). It is therefore necessary to examine the "questions" presented by the petitioner in light of the actual circumstances in this case.

A. THE DISTRICT COURT DID NOT ERR IN DISMISSING THE PLAINTIFF'S ALLEGATIONS OF A RICO VIOLATION.

As petitioner moves from court to court, his allegations of a conspiracy against him become more far-reaching and fanciful. At the same time, petitioner has abandoned any pretense of relying upon the record below. Thus, his Petition for Certiorari contains allegations of a "perfect scheme" being carried on in Camden Bankruptcy Court, and warns that there is "no greater threat to our society" than the corruption of our judicial system. (Petition at 18-19.) Petitioner speaks loosely of there being multiple victims of a RICO scheme in this case, and indeed, that the scheme imperils our entire society. His wild contentions are wholly belied by the pleadings actually submitted by the Petitioner to the trial court.

For example, in his responsive papers dated November 3, 1990, he stated that "plaintiff's complaint seeks damages as a result of those injuries sustained solely by the plaintiff and not by any other entities." (Emphasis in the original.) Slawek's belated attempt to manufacture multiple, unnamed "victims" of the supposed "bankruptcy ring" therefore flies in the face of the representations he himself made to the trial court.

As the United States District Court Judge observed in his decision dismissing plaintiff's Complaint:

> Accepting as true the plaintiff's accusations, the existence of a "pattern" is absent. There was but one alleged victim in this scheme, namely the plaintiff. The entire scheme, if it is believed, was

> created for the purposes of driving the plaintiff out of business and exploiting the business that was developed. See, RICO Case Statement at 5-10; supra, note 3. The activity of the defendant does not pose a greater societal threat of the sort to be redressed through RICO. Rather, this case, if believed, is a "'garden variety' business fraud. . ." and not actionable under RICO. Barticheck, 832 F.2d at 40. (Footnote excluded.) (E12-E14.)

Although it was not necessary for the District Court to reach other issues, it is respectfully submitted that there are numerous other ways in which the plaintiff's RICO complaint was deficient, and which would also have supported its dismissal.

In order to prove a RICO violation, a plaintiff must establish: (1) that the defendant, through the commission of two or more predicate acts, (2) constituting a "pattern", (3) of "racketeering activity", (4) directly or indirectly invests in, or maintains an interest in, or participates in an "enterprise", (5) the activities of which affect interstate or foreign commerce. 18 U.S.C. § 1962 (1984); See also Aeropulse, Inc. v. Armstrong & Brooks Ltd., 740 F. Supp. 938 (E.D.N.Y. 1990).

Although a number of deficiencies in the plaintiff's RICO allegations were pointed out in the various motions of the defendants,[2] the District Court first addressed the threshold issue of whether the plaintiff had established "a pattern of racketeering activity. . . ." H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, (1989). As observed in Sedima, S.P.R.L. v. Imrex Co., 473 US 479, 496 (Note 14) (1985) RICO is not directed at "sporadic" but continuing activity. "It is this factor of continuity plus relationship which combines to produce a pattern. . . ." The District Court quoted from the recent decision of the Supreme Court in H. J. Inc., that:

> A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy its requirement: Congress was concerned in RICO with long-term criminal conduct. . . . Id. at 2902.

The Court went on to observe that controlling precedent in this Circuit requires an evaluation of a number of factors. These include "the number of unlawful acts, the length of time over which the acts were

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[2]For example, a RICO claim cannot be maintained against the Township of Lower and the Lower Township Municipal Utilities Authority since they are both governmental entities. Genty v. Resolution Trust Corporation, 937 F.2d 899 (3d. Cir. 1991).

committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity. . . ." Bartichek v. Fidelity Union Bank/First National Bank, 832 F.2d 36, 39 (3rd Cir. 1987).

A "pattern of racketeering activity" is defined in 18 U.S.C. § 1961 as "at least two acts" of prohibited conduct within a ten year period. These "predicate acts", in turn, are defined as including specifically enumerated federal criminal offenses, such as mail fraud (18 U.S.C. § 1341), and wire fraud (18 U.S.C. § 1343).

In the context of a mail or wire fraud case, the plaintiff must show precisely which defendant caused what to be mailed when, what false statements were made, and how the mailing or interstate communication furthered the fraudulent scheme. Bock & Sons, Inc. v. U.S. Realty, Inc., 1990 W.L. 50771, Rico Business Guide ¶ 7496 (E.D. Pa. April 20, 1990). Moreover, the plaintiff must demonstrate that the mailing or interstate communication was at least incidental to an essential part of the scheme. Evanston Bank v. Conticommodity Services, Inc., 623 F. Supp. 1014, 1025 (M.D. Ill. 1985).

In H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989), the Supreme Court found that to establish a RICO pattern the predicate acts must be (1) related, and, (2) amount to, or otherwise constitute a threat of racketeering activity. Id. at 240. The Court also determined that the mere fact that two or more predicate acts are committed in furtherance of a fraudulent scheme is not by itself sufficient to establish a RICO pattern. Id.

Plaintiff must also allege that his injuries were the result of the defendants' investment of racketeering income in an enterprise. Moreover, a plaintiff must prove that he was injured in his business or property "by reason" of the violation. 18 U.S.C. § 1964(c) (1984). The "by reason of" language requires a plaintiff who brings a civil RICO action to show how a RICO violation caused his injury. Grafman v. Century Broadcasting Corp., 743 F. Supp. 544 (N.D. Ill. 1990). The plaintiff must also demonstrate that the alleged injury was actually and proximately caused by the predicate acts that formed the pattern of racketeering activity. Enzo Biochem, Inc. v. Johnson & Johnson, 1990 W.L. 136038, RICO Business Guide ¶ 7571 (S.D.N.Y. September 12, 1990). Proximate cause will be found if the predicate acts are a substantial factor in bringing about the plaintiff's injury and if the injury is reasonably foreseeable or anticipated as a natural consequence.

Courts have also properly dismissed civil RICO cases, such as the present, filed by bankruptcy debtors against creditors, or others involved in the bankruptcy proceedings, for failure to allege two predicate acts, a pattern of such predicate acts, or an enterprise. See Stavriotis v. Gerald Litwin, 1986 W.L. 12005 (N.D. Ill. 1986). Communications to the bankruptcy court, or those relevant to its proceedings, are not predicate acts.

The facts as stated by plaintiff failed to meet the requirements of civil RICO. All alleged facts involve one plaintiff, one property, and one transaction, namely, the sale of the Anchorage Inn and the resulting bankruptcy proceedings. More importantly, these alleged acts occurred in a few months and do not pose a threat of "continuing" racketeering activity.

Where plaintiff's complaint and RICO case statements were so clearly deficient, plaintiff's complaint was properly dismissed as a matter of law. Plaintiff has produced no facts which would create a fact question. Accordingly, the plaintiff's allegations under RICO could properly have been subjected to dismissal on the pleadings for numerous other reasons in addition to those articulated by the District Court Judge.

B. THE DISTRICT COURT DID NOT ERR IN DISMISSING THE REMAINDER OF THE PLAINTIFF'S COMPLAINT.

The Petitioner continues to insist that the courts below erred in concluding that there was no diversity jurisdiction in this case, but neglects to point to any error in the specific findings of the Court of Appeals on this issue. The Petitioner concedes that he is a Pennsylvania resident and that the defendant Atlantic City Press is an entity owned by the South Jersey Publishing Company, which is a Pennsylvania corporation (Petition at 22). Petitioner also recites the fact that by Order dated January 18, 1991, he was allowed to dismiss his Complaint as to the individual defendant in order to "preserve" diversity jurisdiction. The Petitioner's Amended Complaint, however, subsequently brought that non-diverse party back into the litigation. That is, Petitioner's Amended Complaint of January 29, 1992, explicitly renamed South Jersey Publishing Company as a defendant and incorporated by specific reference each and every allegation set forth in paragraphs 1 through 151 of the original Complaint. In doing so, the Petitioner voluntarily recommenced all of his causes of action against the non-diverse defendant. The plaintiff is therefore

clearly precluded from invoking the jurisdiction of the Federal Courts pursuant to diversity of citizenship. 28 U.S.C. § 32. The Petitioner's argument that his Amended Complaint actually means something other than what it clearly states is akin to his argument that his fanciful RICO conspiracy allegations on appeal are also actually part of the record in this case.

C. PLAINTIFF'S COMPLAINT NEVER INCLUDED A CIVIL RIGHTS CLAIM AND THE DENIAL OF THE MOTION TO AMEND WAS NEVER PRESERVED FOR APPEAL.

Although not listed in the "questions presented" portion of the Writ for Certiorari, plaintiff states in his argument that his original complaint sounded in violation of 42 U.S.C. § 1983 and that his claim under § 1983 should not have been dismissed. This is yet another example of plaintiff's fast and loose interpretation of the facts and record below. Not only did plaintiff's original complaint never allege a § 1983 violation, he never argued below that it did. Hence, in his motion for leave to amend the complaint to name the South Jersey Publishing Company, plaintiff included a request for leave to allege a violation under 42 U.S.C. § 1983. The motion to add a count under 42 U.S.C. alleged a non-specific, conclusory count against all defendants (even the non-governmental defendants) and was properly denied without prejudice by the Magistrate Judge by Order dated January 12, 1992.

The Third Circuit summarily rejected plaintiff's appeal of this order as "without merit", presumably since plaintiff waived his right to appeal by failing to file an

appeal of the Magistrate's Order to the District Court within ten days as required by Fed. R. Civ. P. 72(a) and Rule 40D(4), of the New Jersey Federal Practice Rules. See also, United Steelworkers of America v. New Jersey Zinc, 828 F.2d 1001, 1007-1008 (3rd Cir. 1987) (where no appeal is taken to the District Court from a Magistrate's nondispositive order, the issue will not be preserved for a later appeal to the Circuit Court).

CONCLUSION

The issues raised by the petitioner in his application for a Writ of Certiorari are not founded in the record. The plaintiff's complaint, even as clarified and explained by his RICO case statement, fails to set forth an actionable claim under RICO. The allegations in Slawek's brief to the United States Court of Appeals, and in his petition for Certiorari, bear no resemblance to those contained in his amended complaint. That same amended complaint clearly alleges non-RICO claims against a defendant Pennsylvania corporation, South Jersey Publishing Company. As Slawek is himself admittedly a citizen of Pennsylvania, no separate jurisdictional grounds, based upon diversity, were present. With the dismissal of the plaintiff's only federal claim, based upon RICO, the District Court therefore did not err in declining to exercise supplemental jurisdiction, and in dismissing the remainder of the case in its entirety.

For each of the reasons enumerated herein, therefore, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

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